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8 UNITED STATES DISTRICT COURT
9 WESTERN DISTRICT OF WASHINGTON
AT TACOMA

10 TERRY L. KNIGHT,

11 Plaintiff,

12 v.

13 WAL-MART STORES, INC.,

14 Defendant.
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Case No. C08-5746RJB

ORDER GRANTING
PLAINTIFF'S AMENDED
MOTION FOR
EXTENSION OF TIME
TO FILE RESPONSES
AND RENOTING
DEFENDANT'S MOTION
FOR SUMMARY
JUDGMENT AND
MOTION TO STRIKE
UNTIMELY JURY
DEMAND

20 This matter comes before the Court on Plaintiff's Amended Motion for Extension of Time to File
21 Responses to Motion for Summary Judgment and Motion to Strike Untimely Jury Demand (Dkt. 39). The
22 Motion is addressed to the Court's discretion. Fed.R.Civ.P. 6(b)(1)(B). The Court has considered the
23 pleadings filed in support of and in opposition to the motion and the remainder of the file herein.

24 On October 21, 2009, Defendant filed a Motion to Dismiss Untimely Jury Demand and Setting of
25 Bench Trial (Dkt. 22) and a Motion for Summary Judgment (Dkt. 24). Plaintiff did not file a timely
26 response to Defendant's motions. Under CR 7(d)(3), any opposition papers to dispositive motions shall be
27 filed and served not later than the Monday before the noting date. On November 13, 2009, the Defendant
28 filed a Reply to the Motion for Summary Judgment (Dkt. 30) arguing that the Plaintiff's failure to respond

1 should be considered by the court as an admission that the motion has merit.

2 Later that day, Plaintiff filed a Motion for Extension of Time to File Responses to Motion for
3 Summary Judgment and Motion to Strike Untimely Jury Demand (Dkt. 32) stating that he was unfamiliar
4 with the Court Rules on responsive deadlines and requested that the Court allow him to file responses that
5 same day. On November 14, 2009, Plaintiff filed an Amended Motion for Extension of Time to File
6 Responses to Motion for Summary Judgment and Motion to Strike Untimely Jury Demand (Dkt. 39)
7 asking that the Court allow him to file his responses on November 14, 2009. On that day, Plaintiff did in
8 fact file a Response to the Motion for Summary Judgment (Dkt. 33) and a Response to the Motion to
9 Dismiss Untimely Jury Demand and for Setting Bench Trial (Dkt. 38).

10 On November 18, 2009, Defendant filed a Sur-Reply Pursuant to Local Rule 7(G) Requesting that
11 the Court Strike Plaintiff's Response to Defendant's Motion for Summary Judgment and Response to
12 Defendant's Motion to Strike Jury Demand (Dkt. 40) on the grounds that Plaintiff failed to show good
13 cause for missing the deadline for his response. On November 20, 2009, Defendant filed a Response to
14 Plaintiff's Amended Motion for Extension of Time to File Responses to Motion for Summary Judgment
15 and Motion to Strike Untimely Jury Demand (Dkt. 49) asserting that Plaintiff's negligence is not excusable
16 and requesting that the Court award Defendant attorney fees and costs incurred as a result of Plaintiff's
17 untimeliness. On November 25, 2009, Plaintiff filed a Reply in Support of Amended Motion for Extension
18 of Time to File Responses to Motion for Summary Judgment and Motion to Strike Untimely Jury Demand
19 (Dkt. 52).

20 The Federal Rules of Civil Procedure dictate that all civil actions "should be construed and
21 administered to secure the just, speedy, and inexpensive determination of every action and proceeding."
22 Fed.R.Civ.P. 1. While a lawyer's negligence in failing to carefully read the Court Rules is certainly not
23 commended by this Court, the Court recognizes that we lawyers are not perfect. Where no prejudice is
24 caused by such a failure, it is hard to justify a result that would set the lawyer up for a malpractice claim
25 and penalize his client with a loss of the case on less than its merits. In the interests of justice, the Court
26 favors resolving cases on their merits where possible.

27 Under Federal Rule of Civil Procedure 6(b)(1)(B), the court may, for good cause, allow a party to
28 file a motion for extension of time, even after the time to do so has expired, if the party failed to act

1 because of excusable neglect. Fed.R.Civ.P. 6(b)(1)(B). In *Pioneer Investment Services Co. v. Brunswick*
2 *Associates Ltd. Partnership*, 507 U.S. 380, 395 (1993), the Supreme Court has held that the four-part test
3 for determining whether there has been excusable neglect is (1) the danger of prejudice to the non-moving
4 party, (2) the length of delay and its potential impact on judicial proceedings, (3) the reason for delay,
5 including whether it was within the reasonable control of the movant, and (4) whether the moving party's
6 conduct was in good faith. In *Pincay v. Andrews*, 389 F.3d 853, 855 (2004), the Ninth Circuit Court of
7 Appeals determined that a per se rule on what constitutes excusable neglect is inconsistent with *Pioneer*
8 and district courts are granted the discretion to determine what is excusable neglect. The Ninth Circuit also
9 stated in *Pincay* that it "recognizes that a lawyer's failure to read an applicable rule is one of the least
10 compelling reasons that can be offered," but later acknowledged that

11 the "decision to grant or deny an extension of time....should be entrusted to the
12 district court because the district court is in a better position than we are to
13 evaluate factors such as whether the lawyer had otherwise been diligent, the
14 propensity of the other side to capitalize on petty mistakes, the quality of the
15 representation..., and the likelihood of injustice if the [extension] was not
16 allowed."

17 *Pincay*, 389 F.3d at 859. The Ninth Circuit also described the concept of "excusable neglect" as elastic
18 concept, which is equitable in nature. *Id.* Finally, the Ninth Circuit stated that denying a motion for an
19 extension of time because of the moving party's mere negligence is a per se rule that is too rigid and the
20 district court has discretion to grant an extension of time even if the lawyer had made a calculation error.
21 *Id.* at 860.

22 Negligence is the failure to exercise ordinary care. In this case, Plaintiff's responses were filed five
23 days after the time for a response was due. Plaintiff admits he failed to read the Court Rules carefully. *See*
24 Dkt. 52. Varying Court and Local Rules can be a minefield for the unwary. Although Plaintiff's counsel
25 erred, the likelihood of injustice to his client is great because there is the possibility that Plaintiff's entire
26 case would be dismissed on a procedural error. Furthermore, Defense counsel appears to have used this
27 error as an opportunity to capitalize on Plaintiff's counsel's mistakes. This is not a game of "gotcha." For
28 these reasons, the Court should find that Plaintiff's failure to act was because of excusable neglect and
grant Plaintiff's amended motion for extension of time.

Defendant has not shown prejudice by the Plaintiff's untimely responses, and it appears that the
Defendant has escalated its own fees by so strongly opposing Plaintiff's motion for extension of time. *See*

1 Defendant's Sur-Reply Pursuant to Local Rule 7(G) Requesting the Court to Strike Plaintiff's Response to
2 Defendant's Motion for Summary Judgment and Response to Defendant's Motion to Strike Jury Demand
3 (Dkt. 40) (arguing that Plaintiff's untimely responses should be not considered by the court because
4 Plaintiff's negligence is not excusable), *see also* Minute Order (Dkt. 42) (Defendant contended during a
5 conference call with Plaintiff and Court that Plaintiff's untimely responses should not be considered by the
6 Court), and *see also* Defendant's Response to Plaintiff's Amended Motion for Extension of Time to File
7 Responses to Motion for Summary Judgment and Motion to Strike Untimely Jury Demand (Dkt. 49)
8 (asserting that Plaintiff's negligence is not good cause). However, the Court does recognize that Plaintiff's
9 negligence and delay has caused the Defendant some unnecessary costs and will award \$250 to offset the
10 time it would have taken Defense counsel to call Plaintiff's counsel to remind him of his responsive
11 deadlines and to agree on a short extension. All counsel are strongly reminded that failure to follow the
12 Federal and Local Rules may result in sanctions, and of their obligations as lawyers to act professionally.
13 *See* RPC 1.1; RPC 4.4(a); WSBA Creed of Professionalism.

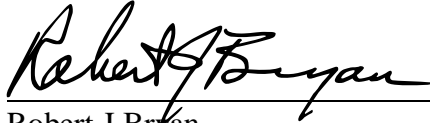
14 Furthermore, as to not prejudice the Defendant and in the interest of justice, the Court will allow
15 the Defendants to file a Reply, if any, to address the merits of Plaintiff's responses, which shall be filed no
16 later than December 2, 2009. As a result of granting Plaintiff's Motion for Extension of Time, the Motion
17 to Dismiss Untimely Jury Demand and Setting of Bench Trial (Dkt. 22) and the Motion for Summary
18 Judgment (Dkt. 24) should be **RENOTED** for December 3, 2009. Plaintiff's Motion for Extension of Time
19 (Dkt. 32) should be stricken as moot and Amended Motion for Extension of Time (Dkt. 40) should be
20 granted.

21 Therefore, it is hereby, **ORDERED** that:

- 22 • Defendant's Motion to Dismiss Untimely Jury Demand and for Setting of Bench Trial (Dkt. 22) is
23 **RENOTED** for December 3, 2009;
- 24 • Defendant's Motion for Summary Judgment (Dkt. 24) is **RENOTED** for December 3, 2009;
- 25 • Defendant's Reply, if any, addressing the merits of Plaintiff's Response is **SHALL BE FILED** by
26 December 2, 2009;
- 27 • Plaintiff's Motion for Extension of Time (Dkt. 32) **STRICKEN AS MOOT**;
- 28 • Plaintiff's Amended Motion for Extension of Time (Dkt. 39) will be **GRANTED**;

- Defendant is **GRANTED** sanctions of \$250; and
- The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

DATED this 25th day of November, 2009.


Robert J Bryan
United States District Judge